No. 8665

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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In the Matter of

FRED E. KEELER,

Debtor.

CLARENCE OCHS, GUY A. KELLEY, and P. L. NEWCOMB,

Appellants,

vs.

O. T. GILBANK and HUGO W. ROMBERG, as Committeemen of the Estate of Fred E. Keeler, debtor,

Appellees.

APPELLEES' BRIEF.

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Statement of the Case and Facts.

O. T. Gilbank and Hugo W. Romberg are the duly elected, qualified, and acting trustees or committeemen under Section 74 of the Bankruptcy Act of the estate of Fred E. Keeler, debtor, and as such trustees acquired in the management and operation of the estate a certain deed covering real property located at Huntington Beach, California, upon which property was located an unproducing oil and gas well, together with oil well machinery, equipment, and supplies. [Tr. 14.] The deed to said property excepted and reserved to the grantors an undivided one-fourth of all minerals contained in said real property, including, but not limited to, oil, gas, and other hydrocarbon substances. [Tr. 13.] The committeemen,

desiring to place the well on production, had numerous negotiations with various persons, including one Arthur G. Gage, and on or about the 6th day of November, 1935, entered into an agreement with the said Gage for the sole purpose of placing the well back on production and to maintain and operate it thereafter. [Tr. 12 to 17.]

A few weeks after November 6, 1935, Gage had a discussion with Gilbank, one of the committeemen, with respect to the agreement, at which time Gilbank informed him (Gage) that the contract conveyed to Gage 60% of 75% of the production from said property. [Tr. 46 and 49.] Subsequently, and during the month of February or March, 1936, Gage assigned and transferred the agreement to Ochs, Kelley, and Newcomb [Tr. 52], the appellants herein. Late in the fall of 1936, the well was placed on production by the efforts of the appellants. The first remittance from the oil produced was made to the committeemen on the 30th day of October, 1936. [Tr. 52.] Approximately two months thereafter, and on the 15th day of January, 1937, Gilbank complained to Newcomb, one of the appellants herein, that the appellants were not accounting to the committeemen for the proceeds of the oil sold in accordance with the contract with Gage. [Tr. 52.] Therafter, and on or about the 16th day of March, 1937, the trustees filed a petition for an accounting and an order to show cause was issued directed against the appellants.

A hearing was had before the referee in bankruptcy, at which time the appellants introduced testimony. At the close thereof, and without introducing, and reserving the right to introduce, oral testimony in contradiction of that of appellants, the committeemen moved for a judgment in their favor upon the ground that "the contract speaks for

itself." The referee, acting upon said motion, found that the contract was clear and unambiguous and could not be altered by oral testimony. [Tr. 8.] Thereafter a petition for review was filed which was heard before the Honorable George Cosgrave, U. S. District Judge, at which time the matter was argued, briefs were filed, and the matter submitted. After due consideration, the Court entered its minute order on the 19th day of July, 1937, finding and ordering as follows:

> "Twenty-five per cent of the oil having been excepted, the parties to the contract never contracted with reference to it. The subject of the contract therefore is seventy-five per cent of the oil produced. (9 Cal. Jur. 322.) I find myself compelled therefore to agree with the referee. The petition for review is denied and the decision of the referee confirmed." [Tr. 40.]

Questions Presented.

The essence of appellants' propositions of law, followed by argument, appears to be as follows:

1. That the contract between the committeemen and Gage is ambiguous.
2. The committeemen have acquiesced in the interpretation placed upon the contract by the appellants.
3. That the committeemen are estopped from placing a construction on the contract different from that of appellants.

The contentions of appellees, however, are:

1. That the contract is clear, explicit, and unambiguous.
2. That the committeemen are not estopped from enforcing a strict compliance with the terms of the contract.

ARGUMENT.

I.

The Contract Entered Into by and Between the Committeemen and Gage Is Clear, Explicit, and Unambiguous.

We believe that the primary question to be decided by this appeal is whether or not the decisions of the referee and the judge of the U. S. District Court are erroneous in finding that the contract is clear and unambiguous and that the same could not be altered or changed by oral testimony. [Tr. 8 and 40.] In presenting this point, we will also consider and discuss points 1, 2 and 3 of appellants' brief.

The Court will, of course, in construing this agreement have in mind that oil in place is part of the realty, and that the agreement should be construed as one affecting real property.

Isom v. Rex Crude Oil, 147 Cal. 659;

Bartholomae Oil Corp. v. Delaney, 112 Cal. App. 314;

Callahan v. Martin, 3 Cal. (2d) 110;

Laugharn v. Bank of America, 88 Fed. (2d) 551 (C. C. A. 9th).

The Court's attention is directed to the clear and explicit language used in the agreement describing the property owned by the committeemen of the estate of the debtor [Tr. 13], which reads as follows:

> "Lots One (1), Three (3), Five (5), and Seven (7), in Block 219 of Huntington Beach, Seventeenth Street Section, in the City of Huntington Beach, County of Orange, State of California, as per map

thereof recorded in Book 4, at page 10, of Miscellaneous Maps, records of said Orange County;

"Excepting therefrom an undivided one-fourth of all minerals contained in said real property, including but not limited to oil, gas, and other hydrocarbon substances, as reserved in the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935, in the office of the County Recorder of said Orange County;"

It is apparent at the very outset that the committeemen represented that they were the owners of only three-fourths of the minerals in place and it nowhere appears in the agreement, either dirctly or indirectly, by inuendo, by reference, or otherwise that they had any right whatever to speak for the owner of the reserved and excepted portion of the property. It is an elementary principle of law that where a reservation or exception is provided for in a deed, it is as though that portion of the property so reserved or excepted had never been included in the deed.

Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914:

"An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted which but for the exception would have passed to the grantee under the general description. *The effect in such cases in respect to the thing excepted is as though it had never been included in the deed."*

Forest Lakes Mutual Water Co. v. Santa Cruz Land Title Co., 98 Cal. App. 489, 277 Pac. 172:

"Where the common grantor conveyed certain land reserving for himself . . . the water of the stream

> . . . the reservation of the water was an exception . . . *and operated to withhold from the thing granted the right to the water so excepted and described.*"

It is contended by the appellants that by virtue of paragraph 4 of the agreement [Tr. 15] that they are entitled to 60% of 100% of all of the oil and gas produced, saved, and sold from said premises. The Court will note that the language contained in said paragraph 4 is very clear and explicit in that it recites, "60% of . . . all oil and gas produced, saved, and sold *from said premises*". There being but one description of real property in the agreement, "*said premises*" can refer to no other premises than those first described, from which is excluded that portion of the premises belonging to the grantor, the Pacific Electric Land Company. To give any other meaning or construction to this agreement would be to draw an entirely new agreement, for there was only one description of the premises to which the agreement could possibly refer. Likewise, to give any other construction to the agreement would in effect hold that the committeemen contracted, and the Court approved a contract covering "premises" over which neither the committeemen themselves nor the Court had any power, control, or jurisdiction. The referee in bankruptcy and the reviewing judge of the U. S. District Court ruled that the 60% of the oil and gas produced from said premises referred to the premises solely under the control and jurisdiction of the committeemen and of the Court, and which constitutes a 75% interest in all minerals contained in said real property. [Tr. 20, 22 and 40.] Hence, 60% to be retained by the appellants could be computed only upon the oil and

gas owned by the estate and not upon the oil and gas to which the estate had no title or interest and which was not a subject upon which the committeemen could contract. We believe that a careful reading of the agreement, the construction of which is herein involved, makes obvious the correctness of the rulings and findings of the referee in bankruptcy and of the U. S. District Court.

The first point of appellants' brief is to the effect that the evidence in this case substantiates a conclusion that the committeemen acquiesced in the interpretation placed upon the contract by the appellants. This, in our opinion, is an instance where "the wish is the father of the thought". The Court realizes, of course, that the committeemen did not introduce any oral evidence at the trial for the reason that the lower court found that the contract was clear, explicit, and unambiguous. Where such a finding is made the Court will not under any conditions substitute its interpretation of the contract for that of the parties. A most recent decision expounding this fundamental point of law is found in the case of *Bacciocco v. Curtis,* 94 Cal. Dec., page 337 (Sept. 24, 1937) as follows:

> ". . . It is equally well settled that when the contract is clear and unambiguous, the courts will not substitute their interpretation when such course would establish a contract radically different from the one made."

See, also, 6 *Ruling Case Law,* page 835, and 836, Sec. 225:

> "It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties, and then carry out that intention regardless of whether the instrument contains language

> sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument."

But, nevertheless, the record herein shows that Gilbank and Hunter (the attorney for the committeemen), even before the contract was assigned or any work done on the well by the appellants, insisted to Mr. Gage that the contract conveyed 60% of 75% of the production. [Tr. 46 and 49.] The record also shows that payments were made to the committeemen from October 30, 1936, and that Gilbank, one of the committeemen, objected to the distribution approximately two months later. [Tr. 52.] It is obvious, therefore, from these facts that at no time have the committeemen acquiesced in the constrained construction that the appellants are now attempting to place on the contract.

The cases cited by the appellants on this point are cases not remotely connected with the facts in the instant case. They are used merely to cite a general principle of law and are all similar to the case of *Mitau v. Roddan,* 149 Cal. page 14, which is cited by appellants. This is a case where the parties to a contract harmoniously carried out the terms of a contract over a number of years and even up to the month of its repudiation. The Court held, of course, that the parties had placed a practical construction upon the contract. We have been unable to find any case which upholds the theory expounded by the appellants that the Court will follow the interpretation placed upon a contract by the parties even though it be erroneous. See Sec. 241, 6 Ruling Case Law, at page 852.

The second point of appellants' brief attempts to argue that the contract is ambiguous and that the provisions

thereof must be construed most strongly against the maker. In support of this contention, the appellants rely upon certain testimony given by their witnesses. However, it will again be noted that before Mr. Gage assigned the contract to the appellants or before the appellants performed any work on the well, Hunter and Gilbank informed Gage at a meeting that the contract was 60% of 75% of the production. [Tr. 46.]

> *Parkovich v. Southern Pac. R. R. Co.,* 150 Cal. 39, at page 45:
>
> "A reservation or exception in a grant is to be interpreted in favor of the grantor."

The appellants attempt to infer that because Mr. Hunter did not testify and because he made no denial to the statements made by the appellants' witnesses, that the trustees are bound by appellants' testimony. Construing the statements most liberally in favor of the appellants as set forth in their brief at page 15 on this point, the Court will note that the statements alleged to have been made by Mr. Hunter are not statements of a fact, but merely express a legal opinion by Mr. Hunter. The Supreme Court in the case of *Herman Sturm v. Boker,* 150 U. S. 312, states:

> "What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally known to both parties. Such statements of opinion do not operate as estoppel. If he had said in express terms that by the contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract and not such a declaration or admission of a fact such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

See also *Crary v. Dye,* 208 U. S. 515, 52 L. Ed. 595; and *Horton v. Winbigler,* 175 Cal. 149, to the effect:

> "Where there is nothing ambiguous or uncertain in the terms of written instruments, they speak for themselves, and the attorney who prepared them cannot testify as to what was intended by their terms."

The third point of appellants' brief in substance is to the effect that the contract intended to state that Gage was to receive 60% of 100% of the production. The appellants have undertaken to show what the parties to the contract intended by the language used and for that purpose refer to certain negotiations at and before the time of the execution of the contract, and refer only to an alleged statement made by Mr. Gage that he could not produce the property unless he got 60% of the oil on the property. (App. Br. p. 18.) The appellants, however, have overlooked the admission of Mr. Gage that his preliminary negotiations were based upon proposals in the form of letters and that they provided, first, for the payment to the Pacific Electric Land Company *and then for a division.* [Tr. 47.] Appellants contend that if it was not the intention of the parties that Mr. Gage was to receive 60% of the whole, the parties would have stated that he was to receive 60% of 75%. If this contention be true, then the provisions in paragraph 5 of the contract [Tr. 15] mean that the committeemen's interest is 40% of the whole, instead of 40% of 75%. Is it possible that the appellants can argue that "First Party's oil and gas" means not only their own but the oil and gas reserved, excepted, and belonging to the grantor, the Pacific Electric Land Company? The answer, in our opinion, is axiomatic, for as Judge Cosgrave in his minute order has said, "Twenty-five per cent of the oil being excepted, the parties to the contract never contracted with reference to it. The subject of the contract therefore is seventy-five per cent of the oil produced."

II.

The Committeemen Are Not Estopped From Enforcing a Strict Compliance With the Terms of the Contract.

In presenting this point we will also consider the fourth and final point of appellants' brief.

The requirements requisite to the establishment of an estoppel *in pais* are academic. The Supreme Court of the United States has said in the case of *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, that

> "For the application of that doctrine there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud by which another has been misled to his injury. . . . The primary ground of the doctrine is that it would be fraud in a party to assert what his previous conduct had denied when on the faith of that denial others have acted."

Certainly the appellants will not contend that there was any deception in the conduct or statements of the committeemen or such gross negligence on their part as to amount to fraud by which the appellants have been misled to their injury.

The Court will note that the appellants have not introduced any evidence which would tend to show that the appellants either knew of or relied upon any statements of Hunter or acts of Gilbank, which could be asserted as constituting conduct which estops the estate from enforcing a strict compliance with the terms of the contract. If Gilbank's actions, together with those of his attorney, Hunter, could by any stretch of the imagination be termed to constitute an estoppel, the answer is obvious:

The powers of the committee are joint, not several; hence the act of one member of the committee, whether it be intentional or unintentional, could not bind the committee as a whole, and therefore could not bind the estate.

Where there are two or more trustees, they must act jointly in order to have their acts bind the beneficial estate or have any validity. In this instance, there is no testimony concerning Romberg, the co-trustee or co-committeeman. This rule is well established, examples of which are found in the following decisions of the U. S. Supreme Court:

Wilbur v. Almy, 12 Howard 178, 13 L. Ed. 944;
Winslow v. Baltimore Railroad, 188 U. S. 646, 47 L. Ed. 635.

That appellants "labored an extra day or spent an extra dollar upon the faith" of any of the statements of the appellees or upon their conduct the record fails to disclose.

Conclusion.

In conclusion we maintain and contend that the contract out of which this controversy has arisen is clear, explicit, and unambiguous, and that the same cannot be changed or altered by oral testimony.

We respectfully submit that the judgment of the referee in bankruptcy and that of the District Court should be affirmed.

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